IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN K. JONES	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PENNSYLVANIA MINORITY BUSINESS DEVELOPMENT AUTHORITY, ISABELLE SMITH and EUGENE HESS	:	**NO. 97-4486**

M E M O R A N D U M

WALDMAN, J. **July 9, 1999**

I. Background

Plaintiff has asserted claims under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12133, and the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). He alleges that defendants denied him a loan because he is disabled. He seeks "compensatory and punitive damages" for "physical and emotional injury," "mental anguish" and "economic injury."[1]

Presently before the court are the parties' cross motions for summary judgment.

II. Legal Standard

When considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of

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[1] Plaintiff also has a state suit against the Minority Business Development Authority for breach of contract in which he seeks the $60,000 he sought to borrow and $450,000 in alleged lost business profits.

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

While the parties clearly differ on the conclusions to be drawn, the pertinent facts are essentially uncontroverted. They are as follow.

Plaintiff was a postal worker from 1988 to October

1991. Plaintiff is now the president and sole shareholder of Street Sounds Recording and Production Co., Inc. ("Street Sounds"). In 1991, while employed by the U.S. Postal Service, plaintiff was the subject of an internal sexual harassment investigation. As a result, he developed a stress-related condition which was originally diagnosed as an "adjustment disorder with mixed emotional features." The diagnosis was later changed to "generalized anxiety disorder." Plaintiff's condition involves "difficulty concentrating, mistrust of all authority figures and feelings of being on edge," as well as a "greatly decreased sex drive" and "sleeping difficulties." Plaintiff was "not able to work in any structured work situation" resembling the postal service. Plaintiff has received workmen's compensation from the U.S. Department of Labor since 1993.

Defendant Pennsylvania Minority Business Development Authority ("PMBDA") is an agency of the Commonwealth of Pennsylvania created for the purpose of providing low-interest loans to minority-owned and operated businesses. At all times relevant to this action, defendant Isabelle Smith was the PMBDA executive director and defendant Eugene Hess was a PMBDA economic development analyst.

By early 1995, the PMBDA had become the subject of considerable criticism because of the high delinquency and default rates of its loans. In January 1995, the Pennsylvania

House of Representatives passed a resolution that no new funds would be appropriated by the House for the PMBDA until a comprehensive audit was conducted. See House Resolution 25 (1995). The resulting audit was completed in May 1995. The audit report criticized the PMBDA, inter alia, for lack of controls over loan documentation resulting in "potential losses due to loans being approved without merit or inadequate collateral coverage."

On April 24, 1995 plaintiff applied to the PMBDA for a $60,000 business loan for Street Sounds. He presented a business plan according to which the funds would be used to record and to market rhythm and blues and rap music. Although Street Sounds was incorporated in 1991, the proposal was pitched as a start-up plan because the business had been relatively inactive due to plaintiff’s lack of capital and disability.

Plaintiff stated in his application that he was on disability status from the U.S. Postal Service and was receiving monthly disability checks. In a letter of May 18, 1995, plaintiff noted that he could use these payments as working capital and to service the loan.

Plaintiff’s initial contact at the PMBDA was Kelbin Carolina, then the PMBDA regional representative for Philadelphia. In November 1995 Mr. Carolina’s position was terminated. After Mr. Carolina’s departure, Mr. Hess took over as plaintiff’s contact. Mr. Carolina had formed a positive opinion of plaintiff and his business proposal. When Mr. Carolina presented the application to Ms. Smith, she noted plaintiff’s receipt of disability payments and expressed a concern about "whether [plaintiff] could manage the business" for which the loan was sought as required by PMBDA regulations. She also expressed scepticism about the merits of the business proposal. Mr. Carolina told Ms. Smith that he believed that plaintiff was competent and able to manage Street Sounds.[2]

Ms. Smith also objected to plaintiff’s plan to run the business out of his residence and required that some business address be established. Plaintiff agreed to designate 2318 Rosemarie Avenue, where he had previously been residing, as Street Sound’s business address.

Plaintiff’s application was presented to the Loan Evaluation Committee on July 13, 1995. The committee voted to recommend approval of plaintiff’s loan to the PMBDA Board of Directors. The Board met on July 27, 1995 and voted to approve the loan, subject to the fulfillment by Street Sounds of certain conditions. The PMBDA notified defendant by commitment letter

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[2] Mr. Carolina had a strained personal relationship with Ms. Smith. He states that he "perceived" Ms. Smith was engaging in disability discrimination by raising concerns about plaintiff’s disability and the merits of his business proposal. Mr. Carolina, however, acknowledges that he has no first-hand knowledge regarding the decision to rescind the loan commitment to plaintiff almost a year after Mr. Carolina was terminated.

dated August 18, 1995 of its approval and of the conditions required of Street Sounds.

In accordance with PMBDA standard procedures, plaintiff was to provide at closing an "equity injection" equal to 25% of the total business project costs of $80,000 and to secure the loan with second mortgages on his real property at 6013 Magnolia Street and 450 East Walnut Lane. The commitment letter also restricted the use of the loan funds to video production and audio and video promotion instead of unrestricted working capital. The letter notified plaintiff that the commitment would expire on November 30, 1995. In December, plaintiff requested and obtained a ninety-day extension of the loan commitment to February 28, 1996.

A closing was scheduled for April 3, 1996. The closing did not go through because plaintiff had not obtained mortgage waivers on the properties at 6013 Magnolia Street and 450 E. Walnut Lane. Plaintiff also stated that he wished to change the terms of the loan agreement.

On April 4, 1996 plaintiff requested that Street Sounds be allowed to use $20,000 of the loan proceeds as unrestricted working capital and that Street Sounds's prior expenditures be credited towards satisfaction of the $20,000 equity injection requirement. The PMBDA agreed to amend the terms of the proposed loan to allow $10,000 of the proceeds to be used as unrestricted working capital and to credit Street Sounds for any purchases made after July 1, 1995, the month the application had been approved. On April 22, 1996, plaintiff renewed his request to allocate $20,000 of the proceeds for unrestricted working capital. This request was not approved.

About one month later, plaintiff obtained a mortgage waiver on the 450 E. Walnut Lane property. By letter of April 26, 1996, Ms. Smith informed plaintiff that the PMBDA was concerned that he had still failed to obtain a mortgage waiver on the property at 6013 Magnolia Street and that he had not provided the equity injection in cash or receipts for purchases. Plaintiff responded by letter of July 16, 1999 that he wished to substitute a newly acquired property at 6009 Magnolia Street. Plaintiff also submitted canceled checks showing expenditures by Street Sounds after July 1, 1995 of almost $11,000 for rent and utilities on the Rosemarie Avenue Apartment and a copy of corporate minutes stating: "on December 18, 1995 Street Sounds Recording and Production Co. Inc. agreed to purchase equipment and convert loans from stockholders into paid in capital. Equipment purchased from stockholders on December 18, 1995 totaled $11,731.00." No receipts were provided for the equipment.

On August 12, 1996 plaintiff met with Mr. Hess to discuss the unresolved issues regarding his loan application.

Mr. Hess informed plaintiff that the PMBDA would not accept the corporate minutes as evidence that he had in fact provided $11,000 worth of equipment and that the PMBDA was concerned about the collateral value of the 6009 Magnolia Street property and lack of success of Street Sounds over the previous five years.

According to the documentation submitted by plaintiff the property at 6009 Magnolia Street was appraised at $42,000 only nine days after he purchased it for $15,000 with a $10,000 mortgage. Plaintiff's explanation was that he purchased the property from a friend at substantially below market value and made $5,000 worth of renovations. The PMBDA required further proof of the claimed market value of the property. None was forthcoming.

On August 28, 1996, plaintiff submitted a receipt made out and signed by himself showing the transfer of equipment valued at $11,731 to Street Sounds in December 1995. No receipts of the underlying purchases or evidence of the equipment's market value were provided. Defendants rejected this documentation as evidence of capital contributions for the equity injection requirement.

By letter of September 9, 1996, Ms. Smith notified plaintiff that the PMBDA intended to rescind the loan commitment because he had not made the required equity injection, did not provide sufficient collateral and had not presented sufficient evidence of likelihood that he could meet the projected debt service. The PMBDA declined to accept copies of bank statements from April 1995 showing $27,200 as proof of plaintiff’s assets and ability to make a capital contribution in September 1996. On September 24, 1996, plaintiff requested the PMBDA to reconsider and stated that he had provided "near total collateral" and that a capital contribution was "still possible." No new evidence of collateral or of plaintiff’s capacity to make the equity injection was provided. On September 26, 1996, the PMBDA Board voted to rescind the commitment to lend $60,000 to Street Sounds and so advised plaintiff by correspondence of that date.

IV. Discussion

A. The ADA Claim

To establish a violation of Title II of the ADA a plaintiff must show that he was a qualified individual with a disability, that he was denied the benefit of a public program or service or otherwise discriminated against, and the discrimination or denial of the benefit was due to his disability. See 42 U.S.C. § 12132; Weinreich v. Los Angeles County Metropolitan Transp. Authority, 114 F.3d 976 (9th Cir. 1997), cert. denied, 118 S. Ct. 423; Adelman v. Dunmire, 1997 WL 164240, at *1 (E.D. Pa. March 28, 1997), aff’d, 149 F.3d 1163 (3d Cir. 1998). The parties do not dispute that plaintiff was denied the benefit of the loan program provided by the PMBDA.

Defendants argue that plaintiff was not disabled, was not qualified and was not in any event denied a loan for any reason related to his claimed disability.

For the purposes of the ADA, "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102. Jerry Cimmet, a psychologist, states in his report that plaintiff has suffered from "generalized anxiety" since at least November 1993. Defendants challenge that this impairment limits a major life activity.

Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Taylor v. Phoenixville School Dist., 174 F.3d 142, 152 (3d Cir. 1999) (quoting 29 C.F.R. § 1630.2(I)).[3] Plaintiff contends that his generalized anxiety disorder causes him to be substantially impaired in the major life activities of working, interacting with people, sleeping, concentrating and functioning sexually.

When considering impairments of activities other than working, the inquiry is directed at comparing the plaintiff's

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[3] But see Sutton v. United Air Lines, Inc., 1999 WL 407488, *14 (U.S. June 22, 1999) (questioning but not resolving whether working is a "major life activity").

ability compared with the "average person in the general population." Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783 (3d Cir. 1998). An individual is substantially limited in working where there is "a significant restriction in the ability ‘to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill and abilities.’" Mondzelewski, 162 F.3d at 783 (quoting 29 C.F.R. § 1630.2(j)(3)(I)). Dr. Cimmet’s conclusion that plaintiff is unable to work in a structured work situation is sufficient to show that he is restricted from performing most of the jobs for which he would otherwise be qualified.

Defendants assert that even if plaintiff was disabled at the time of his application, he was not a qualified individual with a disability. A "qualified individual with a disability" is "an individual with a disability who, with, or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services." See 42 U.S.C. §12131(2). "Essential eligibility requirements" are those reasonably necessary to accomplish the purpose of the program. See Pottgen v. Missouri State High School Activities Ass’n, 40 F.3d 926, 931 (8th Cir. 1994); Bowers v. National Collegiate Athletic Ass’n, 974 F. Supp. 459, 466 (D.N.J. 1997).

Defendants argue plaintiff did not meet the eligibility requirements specified in the commitment letter and that those requirements were essential to the loan program. It is uncontroverted that the scheduled closing fell through because plaintiff had not obtained the mortgage waivers. Defendants assert that the loan was ultimately rescinded because plaintiff never showed the ability to satisfy the terms of the commitment letter.

Plaintiff states that he satisfied the collateral requirement by substituting the 6009 Magnolia Street property for the 6013 Magnolia Street property. Defendants rejected the substitution due to their concern that plaintiff was substantially overstating his equity in the 6009 Magnolia Street property. Any prudent lender would be skeptical about a claim that one had sold his property, even to a friend, for $22,000 less than and barely 40% of the market price. Defendants' desire for further proof of the claimed market value was consistent with sound lending policies essential to the operation of the PMBDA program.

Defendants contend plaintiff also failed to present proof that he was able to make the required $20,000 equity injection. Plaintiff states that he presented receipts showing purchases by Street Sounds of nearly $22,000. Over half of this amount, however, consisted of a purported transfer of $11,731 worth of equipment from plaintiff to Street Sounds for which plaintiff did not have dated receipts or comparable evidence of market value. Depreciation schedules he provided indicated the equipment was old and had been largely depreciated.

Plaintiff asserts that he presented proof of the capacity to make the $20,000 equity injection in cash. He refers to the copies of 1995 bank statements. In accordance with PMBDA policy, this was rejected as too old to prove plaintiff’s current capacity to make the capital contribution. Mr. Carolina’s uncontroverted deposition testimony is that the policy of the PMBDA was not to rely on old bank statements but to require current verification of the ability to make a cash equity injection. It is uncontroverted that plaintiff did not submit updated records of bank deposits. With his statement of September 24, 1996 that a "cash injection [was] still possible," plaintiff provided no supporting evidence or explanation of when or how such an injection could be made. Plaintiff has presented no evidence that he demonstrated to defendants an ability to meet the equity injection requirement.

Defendants assert with force that collateral and equity injection were essential eligibility requirements. PMBDA regulations require that any loan recipient "pledge and maintain real and personal property as collateral, in the form and amount necessary to reasonably assure payment of the loan in the event of default or bankruptcy." See 12 Pa. Code § 81.111(a)(8). "At least 25% of the eligible project costs shall be contributed in cash from sources other than the Authority." See 12 Pa. Code § 81.112(a)(3). These requirements clearly are designed to ensure the credit worthiness of borrowers, to protect public funds, to avoid defaults and to help ensure the availability of funds for future qualified applicants.

Plaintiff points to a statement in Mr. Carolina's affidavit that some loans were provided without collateral. He overlooks, however, Mr. Carolina's explanation that such loans had been approved only where the borrower's "total assets exceeded the loan amount." There is no evidence that plaintiff presented proof of assets exceeding the loan amount. There is also no evidence that any such loan was made after the General assembly threatened to terminate funding because of the default rate. Plaintiff also points to the report of the audit of the PMBDA which notes that several loan files contained no documentation of collateral. The report did not state, however, that the loans had been approved without sufficient collateral. Moreover, it is nonsensical to suggest that the PMBDA was obliged to continue to engage in the kind of conduct which jeopardized its funding and resulted in the highly critical audit report.

Plaintiff points to a statement in PMBDA's Operational Manual which provides: "[t]hat portion of the 25% equity contribution spent prior to submitting the application can be considered on a case-by-case basis, given the approval of the Executive Director." Plaintiff presents no evidence that he requested such approval or could have demonstrated sufficient prior expenditures to satisfy the requirement. Plaintiff presented no evidence to the agency to substantiate the value of equipment for which he sought a credit. Moreover, the Operational Manual also provides that as of July 7, 1994, the equity injection "must be from business savings (investment account) or cash equity (personal savings account)," which would preclude satisfaction of the equity injection requirement by prior expenditures.

The ADA requires that a reasonable accommodation be made for an individual’s disability, so that he is not disadvantaged by reason of the disability. It does not require that an individual must be accommodated because he happens to have a disability. Plaintiff does not contend that he failed to meet the terms of the commitment letter for reasons related to his anxiety or that he could have satisfied the essential eligibility requirements for a PMBDA loan if the affects of his disability were accommodated. The PMBDA operates a loan program and not a grant program. It is clear that giving money to applicants without adequate collateral, capital or equity would fundamentally alter the program and impose an undue burden from increased defaults and depletion of funds for credit worthy borrowers.

Even if the collateral and equity injection requirements were non-essential, the denial of plaintiff's loan request for the reason that he failed to meet the terms of the commitment letter was not disability discrimination. A public agency does not engage in disability discrimination when it denies benefits to a disabled person who does not meet conditions of the program unrelated to the applicant's disability. See Bowen v. American Hosp. Ass'n, 476 U.S. 610, 630 (1986) (no discrimination where hospital refused to treat child who had not satisfied hospital requirement of parental consent); Sandison v. Michigan High School Athletic Ass'n, Inc., 64 F.3d 1026, 1030 (6th Cir. 1995) (no discrimination where disabled student was denied participation in athletic program because of age); Lucero v. Hart, 915 F.2d 1367, 1372 (9th Cir. 1990) (employee with emotional disability fired because she could not meet typing requirement). Plaintiff has presented no evidence that his failure to meet the collateral and equity injection requirements was occasioned by his disability.

Plaintiff contends that the PMBDA discriminated against him by imposing stricter requirements on Street Sounds than it did on other applicants. He points to the statement of Mr. Carolina that the PMBDA had funded home-based businesses.

Nowhere in the record, however, is any information provided regarding the nature of those home-based businesses. It is clear that some businesses can more successfully be operated out of the home than can others. There is no evidence that these other businesses were similar to Street Sounds. Moreover, the requirement that Street Sounds have a business address was not related to the denial of the loan.

Plaintiff also contends that he should have been given more time to fulfill the loan requirements. By letter of April 12, 1996, Mr. Hess warned plaintiff of the importance of timely completion of the loan requirements. Mr. Hess explained to plaintiff defendants’ concerns at their August 12, 1996 meeting. It is uncontroverted that Ms. Smith warned plaintiff again of the problems in her letter of September 9, 1996. Plaintiff’s response on September 24, 1996 did not demonstrate that even with still more time he had the ability to satisfy the terms for a loan.

Plaintiff states that other loans had been approved after a longer delay, relying on the PMBDA audit report. He fails to note, however, that the report was very critical of the length of the process and that the agency was encouraged to take steps to ameliorate the problem. Also, there is no indication that these loans involved applicants who failed to demonstrate the capacity to meet the requirements for a loan. Moreover, it is uncontroverted that the loan commitment was rescinded only when after more than five months of discussions with plaintiff subsequent to the failure of the scheduled closing and well after the expiration of the extension of the loan commitment, plaintiff was still unable to demonstrate an ability to satisfy the terms. From the evidence presented, one could not reasonably conclude that defendants discriminated against plaintiff by not giving him sufficient time to satisfy the terms of the commitment letter.

Plaintiff finally contends that defendants demonstrated bias by questioning him about his disability. That defendants questioned him about the extent or affect of his disability is not evidence of discrimination. Plaintiff himself informed defendants of his disability and stated it was a reason his business had been inactive in the past. Ms. Smith and any others asked to approve plaintiff's loan application had a legitimate interest in determining whether plaintiff's disability would prevent him from managing and working full-time in the future at Street Sounds as required by PMBDA regulations. See 12 Pa. Code § 81.111(a)(6) & (7).

Once plaintiff assured the PMBDA that he could and would fulfill the management and full-time work requirements, the loan application was approved and indeed the loan commitment was even extended. Defendants worked with plaintiff for over sixteen months in an effort to grant him a loan. The loan approval was rescinded only after plaintiff failed at the scheduled closing, during the extended commitment period and thereafter to satisfy the terms to which he agreed and on which the loan was approved.

From the record presented, one simply cannot reasonably find that defendants' reasons for ultimately denying the loan were untrue or that the decision was motivated by or related to plaintiff's general anxiety condition.

B. Rehabilitation Act Claim

The Rehabilitation Act applies only to programs receiving federal assistance. See 29 U.S.C. § 794(a); Shiring v. Runyon, 90 F.3d 827, 830 (3d Cir. 1996). It is uncontroverted that the PMBDA does not receive federal funds.

V . Conclusion

Plaintiff has not sustained his claims. One cannot reasonably find from the competent evidence of record that defendants' stated reasons for denying plaintiff a loan were untruthful or that they discriminated against him because of his disability. There is no evidence that plaintiff's disability is what prevented his qualification for the benefit in question.

Accordingly, defendants' motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of July, 1999, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that plaintiff's Motion for Summary Judgment is **DENIED;** defendants' Motion for Summary Judgment is **GRANTED;** and, accordingly **JUDGMENT** is **ENTERED** in the above action for the defendants.

BY THE COURT:

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JAY C. WALDMAN, J.